IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent and Appellee,

INTERNATIONAL STEAMSHIP COMPANY, a corporation,
Claimant and Cross-Appellant.

No. 2183

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee and Cross-Appellant

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STATEMENT OF THE CASE.

The cross-appellant, who in the interest of brevity will designate itself as the appellee, is content with the statement of the case made by the appellant so far as it relates to the pleadings, and no further. The

statement made by the appellant as to the decision of the court below might better have been omitted, or else the full opinion of the court recited. Appellant's statement falls into a very common error of brief writers, namely: the assertion that the other side "admits this and that;" or that "such and such are not disputed;" and the statement includes a great many things which counsel for appellant may think are true, but which are not undisputed and which are not admitted, and which we contend are not true. We desire to amend appellant's statement in a number of points. We note the contention of the appellee, that the size of the two vessels was by us claimed to be and evidence was offered to prove them to be, not only greater in weight for both ships, but that a greater disapproportion existed between their weights than claimed by appellant. The materiality of this evidence being its effect upon statements of witnesses as to the extent of the damage which a vessel of the size, form and weight of the "Indianapolis" would do to a vessel of the size, form and weight of the "Kitsap," if the "Indianapolis" were proceeding under any considerable headway; and as we shall argue later, any considerable headway would have driven her through the "Kitsap" under such circumstances. We desire to correct the statement at

the end of the first paragraph on page sixteen of appellant's brief with reference to the distance between the south side of Pier Four and the north side of the Colman Dock; and to submit that in our opinion the evidence shows the distance to be over eight hundred feet, to be exact, eight hundred and twelve feet. This is material, as will be hereafter argued, as every additional one hundred feet that the Kitsap had to travel in order to reach the collision, which subsequently occurred within a given time, increased her speed. We desire to take issue with the second paragraph on page sixteen of the statement of the case, by stating more fully the exact facts.

The regular course of the "Kitsap" was to back away *free handed* from the *north* side of Pier Four, turning on a port helm as she came ahead, southerly and southwesterly, to turn in an opposite direction on her course. On leaving her dock on the trip which resulted in the collision, she backed away from the *south* side of Pier Four, which not only brought her the width of the dock further south, but she had to swing around the end of the dock before she could even complete her backing up movement, and this also is material. We desire to correct the statement at the bottom of page sixteen in so far as the same is asserted to be undisputed, "that a very dense fog

hung over Elliott Bay." This evidence is not only disputed, but as we shall point out, the chief witness and principal owner of the "Kitsap" will be shown to have disputed it, if it applied to the *whole* bay. It was undoubtedly much heavier on the Seattel shore, mingled as it was with the city smoke, and was thinner, extending into waves and patches, and finally cleared entirely as the harbor was left.

We desire to correct the statement of the appellant contained in the last six lines of the first paragraph on page seventeen. It is not admitted; it is not undisputed, that the Indianapolis struck the "Kitsap" as distinguished from the "Kitsap" striking the "Indianapolis;" it is not undisputed that the "Kitsap" sank in about twenty minutes; and we submit that the great weight of the evidence was that she sank in a much less time; and that, in a period of time ranging between five and ten minutes.

As supplementing our correction of appellant's statement of the case, we desire to add, that it is our contention that the facts in this case, when stripped of speculation and the wildest kind of guess work, will show that the steamer "Kitsap," after having left the north side of Pier Four on the afternoon in question, proceeded at a rapid gate out into a foggy

condition on the bay and struck and sank a launch, drowning one man; that she returned to her dock, landing, however, at the south side; and within a short space of time was ordered by her owners to proceed upon her course; and that she this time backed out into the fog and headed south along the face of the docks to the southward of the Colman Dock, making a wide and deep sweep into the bay, crossing going south, where she had not the right of way, the path of in-coming vessels, among which was the "Indianapolis," which was by her master and mate known to be then due and over which apprehension was keenly felt by both mate and master; that she finally swung northward and northwestward; and after proceeding a minute in a northwesterly direction sighted and struck the "Indianapolis;" and was sunk, and was subsequently found where she sank, and where one of the chief witnesses of the libelant said she was found, to-wit: "off the Colman Dock." If we satisfy the court of this one fact, we have but to call the court's attention to the admission of her master, that if she did such a thing she did a highly dangerous thing, and we have established her negligence beyond recall. And we shall argue that this negligence consisted not only in violating the rules of the road, (if they apply to a crossing in the fog), and

in turning a dangerous course in a fog, but that the distance she had to travel between two given periods of time, established as her time of departure and the time of collision, would have necessitated her proceeding at a high speed from the dock to the point of collision.

As to the right of way and the application of the crossing rule, we are aware that upon sound principle and supported by decisions, they do not apply in a fog for the reason that vessels can not then determine each other's course. It may be said in this case, however, that if they should ever apply in a fog here is the case, because as the "Kitsap" started out down the water front with the docks on her port side, she knew that she had all inbound vessels on her starboard hand.

We submit that the competent and credible evidence heavily preponderates in favor of the fact that the "Indianapolis," after passing the Duwamish bell buoy, while in misty weather, traveled at her usual full speed for five minutes, during which time the captain could see with a fair degree of safety far ahead of the point within which he could stop the ship and during that time traveled one and one-fourth nautical miles. That he then in successive

stages slowed his ship, until at the time of collision, she was practically at a stand still and was not under sufficient headway to have caused any serious damage from her own motion.

In this connection the fog signals of the two steamers should be taken into consideration. It is contended by the appellee that the signals of the "Kitsap" were heard first on the port bow of the "Indianapolls" and then ahead; and that she was supposed to be passing ahead of the course of the "Indianapolis;" and then that the signals turned and were heard from off the starboard bow and rapidly approaching.

Counsel for appellant argues that it is difficult to accurately locate sounds in a fog, and seeks to apply this fact to the evidence of the appellee. He apparently, however, reasons that sounds in a fog heard by the appellant's witnesses were not subject to this element of frailty.

The appellee contends that the finding of the court below that the collision resulted from any fault on the part of the "Indianapolis" is not sustained by the evidence.

The appellee further contends that even if the collision did result from mutual fault, that the ef-

fort of the appellant to more than recoup its loss and to make a profit out of its accident at the expense of the appellee, wholly warrants the appellee in insisting that the record in this cause does not show that any party to this record has suffered any loss or damage by reason of the salvage operations which were undertaken in raising the "Kitsap;" and that the court below erred in allowing the item of $12,712.20 for salvage.

In maintaining the appellee's appeal the following formal specifications of error are relied upon:

I.

That the court erred in finding and decreeing that the collision mentioned in the pleadings between the steamer "Kitsap" and the steamship "Indianapolis," resulted from the mutual fault of said steamer "Kitsap" and said steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said steamer "Kitsap."

II.

That the court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the pleadings therein, should be di-

vided, and that the libelant should recover one-half of the damage sustained by it and resulting from said collision; and that the cross-libelant and respondent should pay to the libelant one-half of the damages to said steamer "Kitsap" found to have resulted from said collision, and in refusing to award to the cross-libelant and respondent all of the damages resulting to the steamship "Indianapolis" from said collision.

III.

That the court erred in allowing to the libelant in any event any part of the sum of twelve thousand seven hundred twelve and 20-100 ($12,712.20) dollars for the salving of the steamer "Kitsap."

IV.

That the court erred in not awarding to the cross-libelant and respondent the full damages sustained by the cross-libelant and respondent for all of the injuries, demurrage and loss resulting from said collision to said steamship "Indianapolis."

ARGUMENT.

In the opinion of the appellee this whole case hinges sharply and clearly upon the place where the collision occurred As this point is a controlling feature in determining the previous speed of the "In-

dianapolis" and *both the course and the speed of the "Kitsap" previous to the collision.* The "Indianapolis" had to proceed eastward to this point from the bell buoy, within the time covered by the evidence and the "Kitsap" had to proceed southerly and westerly and northerly upon a course within the time given in the evidence, to reach this point. As to its distance from the Colman Dock, the court will have to rely upon rather approximate estimates. As to the fact that it was off the Colman Dock and in line between the Colman Dock and the bell buoy, we think it is futile for the appellant to dispute If we are not mistaken the only witness of the appellant who pretended to locate the place where the "Kitsap" was found was Capt. S. B. Gibbs, who in answer to the question of counsel for the appellant as to whether she was found "off the docks at Seattle," answered, "Yes sir, off the *Colman* Dock." (R. p. 108.) Counsel all through the record refers to "off the docks." His witness said: "Off the Colman Dock." If it were necessary to supplement the evidence of the appellant, the appellee introduced in evidence photographs taken from the south side of the Colman Dock of the dry dock anchored to the wreck of the "Kitsap" before she was raised, which photographs were sighted along the straight edge side of the house of

the dock, and which show the barge straight out in front (and they incidentally show the "Indianapolis" as she proceeded across the bay). These photographs being claimant's Exhibits 5, 6, 7 and 8. Taken in the order of their numbers they show the approach of the "Indianapolis" and her necessary detour to avoid the dock in question, as testified to by the witness Burns. (R. p. 184.)

We are mindful of the inevitable dispute which arises in collision cases between opposing witnesses as to the speed, and oft-times the course, of both vessels; and that courts invariably discount heavily the evidence of witnesses based upon their experiences under the excitement of an impending collision.

The stage in this case in this respect was amply set and the characters were properly attuned thereto.

The "Kitsap" less than half an hour before had been out in this same fog; had, as we shall hereafter argue, had been proceeding at a high rate of speed; had overriden and sunk a launch and drowned a man; had seen fit to turn about to come back to her dock; and had been again sent out into the same fog. In spite of the protestations of her master, we confidently assert she was being navigated by men who

must, with ordinary *humane* instincts, have been, at least, upon some nervous tension. Her passengers and crew must have shared to a certain extent this feeling, and their perception of the facts attending upon the immediate approach of the two vessels must undoubtedly have been more or less warped thereby.

The effect of this is well illustrated in the evidence of the mate of the "Kitsap," who testified that the "Kitsap" was going about four miles an hour. (R. p. 68.) That she was running four or five miles an hour; going very slow. (R. p. 69.) Who testified on (R. p. 76) that he asked the captain if he had "hooked" her on; and that his reason was that he wanted to know *whether or not she was going full speed or going slow;* and what he was doing; and on (R. p. 77) testified: "No I do not know how fast we were going." And on (R. p. 74) that the captain was not as calm as he was before the previous accident. In fact the evidence of the mate of the "Kitsap" and of the master of the "Kitsap," shows that neither one of them knew how fast she was going; and that neither of them knew which way she was going, other than she was swinging on a port helm, not having looked at the compass or having observed surrounding land marks.

If frankness call upon us to admit that the same fog conditions and the impending collision would produce the same effect upon witnesses on the "Indianapolis," we shall certainly be entitled to claim that this want of reliability would naturally be less in the absence of the first tragedy attending the "Kitsap;" and in the fact that the "Indianapolis" had been until she entered the harbor in absolutely clear weather; and that her course was visible to her master for all practical purposes for the first mile and a quarter. Taking then into consideration the frailty of evidence as to course and speed of passenger and crew who stand in a fog and look ahead, we come to a consideration of the tangible evidence of a more reliable character as affecting the course of the "Kitsap." Four witnesses, all experienced, and one thoroughly disinterested, one a shipmaster, and one acquainted with the water front and vessels, as an officer and manager for many years, to-wit: Brydson (R. pp. 196, 197, and 198), Burns (R. pp. 181, 182 and 183), Gleason (R. pp. 229, 230 and 231), and Tucker (R. pp. 224, 225, 226, 227, 228 and 229), swear positively that they saw the "Kitsap," which they knew and recognized, passing south across the face of the Colman Dock previous to the collision in question. They were standing there in anticipation of the arrival of

the "Indianapolis;" they knew the "Kitsap;" they heard her whistle; they saw her as she passed; they remarked upon her speed among themselves; and they all say that she was going fast. Their estimates, of course, naturally do not exactly coincide; they range from ten to twelve miles an hour. The accuracy of their judgment as to her exact speed is not the vital thing; the exact course she was steering is not the vital question; if she was steering a course south of the Colman Dock, whether she was swinging or whether she was going straight across the face of the dock; in other words whether her helm was amidship or at port, or how hard aport is not the vital question; the vital question is *if she was steering the course they testified to,* or an approximate course thereto, she was making a southerly distance from her point of departure, which it was impossible for her to make up except at a high speed and that is the question which cannot be gotten away from. The appellee introduced a drawing or sketch, being claimant's Exhibit 9 in illustration of our contention as to her crossing the course of the "Indianapolis." We shall have occasion hereafter to call the court's attention to the fact that this drawing with a course marked "Course of 'Kitsap' December 14," and "ordinary course of the

'Kitsap,'" is not drawn to a scale, nor does it partake of any highly technical appearance of being accurate. The course of the "Kitsap" may have been flatter; it may have been sharper; it may have been deeper; it may not have been so deep. It was not pretended at the time by counsel for cross-appellant that he could draw the exact course of the "Kitsap;" all we claimed for it is, that it illustrates *some such* course as she must have taken, in that this course went a considerable distance south of the Colman Dock and south of the course which the "Indianapolis" would have to steer from the bell buoy to the Colman Dock; and that it came north again and crossed this course a second time We feel quite sure that if we have not made ourselves plain in this respect to the appellant, we have made ourselves plain to the Court.

The four witnesses above referred to were offered to prove the general course of the "Kitsap" south of the Colman Dock, and as nearly as they could estimate it, her speed. They were standing on the dock waiting for the "Indianapolis." Counsel for the appellant in cross-examination tried to pin them down to exact estimates of time upon which they had not been asked to testify; which were not material from their standpoint, and which they expressly de-

clined to vouch for, but, after considerable hectoring, he managed to obtain estimates from them as to how long the "Kitsap" may have been in view.

The court knows that when a man under such circumstances is finally induced to make a guess and says a minute, half a minute or three-fourths of a minute, he is guessing pure and simple. He does not pretend to be doing anything else; he does not stand with a watch in his hand under such circumstances and count the seconds; and we submit that this evidence which is so vital to the contention of the appellant and which in the absence of any impeachment of these witnesses, would seem to be so conclusive upon their having seen what they said they saw, is compelling beyond question.

We come next to one of the witnesses of the appellant, Charles Wallace, who, was, at the time of the trial, employed by the appellant; and who is one of the two witnesses of the appellant who testified to the course of the "Kitsap" from having seen land marks (and it will be remembered that no witness testified to her course based upon having seen her compass). He testified: "I do not think I looked at the Grand Trunk Dock after we had it abreast of us. I am sure I did not." And a little later: "I do not

think you could distinguish an object more than two hundred feet." And still later: "That it was abeam and was a little closer than two hundred feet." (R. p. 331.) This witness was the mate of the "Reliance," and claims to have steered a parallel course with the "Kitsap" and to have steered upon some degree of port helm. He ties his evidence with the officers of the "Kitsap," showing that the course they claimed to have steered was such as must have taken them south of the Grand Trunk Dock, and necessarily the inference is that the course continued on the same degree of curvature, because otherwise not having looked at the compass they would not know where they were. The appellee introduced a drawing, Claimant's Exhibit "Fifteen," based upon the evidence as to the course steered by the "Kitsap" and the "Reliance," starting off Pier Four and maintaining such a course and such a degree of curvature as would bring them within one hundred feet and two hundred feet, respectively, of the Grand Trunk Dock; and they must have been within one hundred or two hundred feet according to the evidence of the witnesses in order to see the dock. This map is drawn to scale and with mathematical precision. It was identified by a civil engineer, C. W. Bronson, whose evidence appears at (R. pp. 424 and 425), and

which proves beyond contradiction that if these vessels, or either of them, steered such a course as enabled them to see the Grand Trunk Dock abeam, and one hundred or two hundred feet away, that they went south of the Colman Dock before they got on a northerly course.

In passing we desire to call the court's attention to the utter unreliability of witness Wallace with reference to the course steered. For instance he admits that no seaman or anybody else can tell how a vessel is headed when she is steering in a fog, and without looking at the compass, and when one has no objects to determine his course from. (R. p. 332.) He also admitted that his estimate of the course he steered on the day in question was based upon his having steered it at previous times; and later in answer to the question: "So that you do not know what course was actually steered?" he replied, "No sir."

Another witness, Shaw, whose evidence begins on (R. p. 318), testified to having been a passenger on the "Reliance," and that they went so far south that he could see the fireboat; and the fireboat slip is identified as being immediately adjoining the Grand Trunk Dock; and a reference to Claimant's Exhibit Four will show that it is set away into the shore, so

that the evidence of this witness would tend to finally clinch that of the witness Charles Wallace to the effect that the "Kitsap" and "Reliance," while they may have been steered upon a port helm, were not steered with a helm hard a port, but were flattening the course out so as to be proceeding practically at right angles to the water front; and Claimant's Exhibit Number Fifteen applies all the more strongly to the evidence of the witness Shaw. He further admits that his idea of the course steered would simply be an approximation along the line of a previously steered course. (R. p. 324.) The value of his evidence may further be shown by his statement, "That he could see the range light of a vessel five hundred feet in the fog; and that he could hear a man's voice a thousand feet in the fog; and that he did not look at the compass; and that he did not know what the captain of the "Reliance" did with his helm when he stopped the boat on one or two occasions. (R. p. 325.) This witness had been called upon to identify the course of these vessels and his evidence was seriously presented to the court for that purpose, and yet, on (R. p. 326) he says that he does not know what the scale is; does not know what the diameter of the proposed circle on the map was; did not known how far it would be to the end of the dock from the point of collision, and fin-

ally wound up on (R. p. 327) by saying that the course represented a curved line and he supposed that was what they were steering. Furthermore the court can see what a dramatic witness he was when at the bottom of (R. p. 319) he said he heard Captain Hansen of the "Kitsap," supposedly a thousand feet away say: "For God's sake throw that rope," and that he recognized Henry Hansen's voice. How well posted he had been as to the issue that the appellant was trying to make is very suggestively shown on (R. p. 320), where he testifies in answer to the question: "Did you notice at this time how far south she went?" "Well she seemed to go—he drifted away from the dock so it seemed to me as though he was afraid of going south."

It is in evidence in this case that the faster a vessel travels the flatter her degree of curvature will be, and this exactly explains the evidence of appellant's witnesses who base their idea of course on the day in question upon previous occasions, because she was going faster at the latter date and therefore described a larger circle.

The appellant introduced the evidence of one Lieutenant Stewart which appears at (R. p. 298) to the effect that he did not see any vessel pass the Col-

man Dock. Considering the ease with which witnesses may be produced who have not seen anything, it might be surprising that appellant did not secure more evidence of a similar character. It might be ever so truthful, but it has little, if any, weight, as the fact that a hundred men did not see a thing would not disprove the evidence of one man who did see it. This might result from inattention; lack of interest, looking the other way, and anyone of a thousand similar reasons; and the fact that he afterwards heard whistles would not prove that a vessel sounding the whistles had not previously passed down the water front even within his range of vision if he had not had occasion to look at her.

One other witness was produced by the appellant to attempt to off-set the overwhelming evidence of the appelle to the effect that the "Kitsap" did go south of the Colman Dock. The witness Hill, whose testimony begins at (R. p. 405), testified that the vessel that he saw was lying at the *west end* of the Galbraith Dock, which is Pier Three. He then corrected his evidence to say Pier Four. He did not correct it, however, to say that she was lying on the *south* side of the dock, and the evidence of the libellant in this case is that the vessel which was lying at the end of the dock was the *"Reliance"* above re-

ferred to, so that the vessel which this witness saw was evidently the "Reliance." The court will observe in reading the evidence that the "Reliance" and "Kitsap" are by a number of appellant's witnesses said to have gone out together. This witness said he did not see the "Reliance." This witness further testified at (R. p. 409) that when he saw the vessel which he did see leave her dock, she was *five hundred yards* away; and yet the appellant asks the court to believe as to every other witness in this case that you could not see more than one hundred feet or at most, two hundred feet in this dense and heavy fog. Comment on the distance of the two docks apart is unnecessary.

Before briefly taking up the question of the speed of the "Kitsap" from a standpoint of the observation of witnesses on the vessel, we wish to call the court's attention to what we deem a very much more important admission as to her speed as contained in the evidence of her master. Her master testified that this previous collision with the launch took place off the Mud Chute about three or four minutes after he left the dock the first time. (R. p. 40 and 41.) He did not see the Mud Chute, but he arrived at this problematical location from the time he had been on his course; and he says that he was proceeding at that

time under a slow bell, which is the bell he says he was proceeding under when he went out to meet the "Indianapolis." We are perfectly willing to assume that what he says to be the time is only approximately correct. The important point is that he thought and testified that at what he called a slow bell, he had made a distance away from his dock and south and around on his course to a point *approximating* the Mud Chute. We have had the distance on the water front measured by a civil engineer, and it is found that the distance from the south side of Pier Four to the Mud Chute is three thousand four hundred and seventy-two feet. (R. p. 426.) As she was going south when she started, she must have traveled at least that far north in addition to her curve. If this is Captain Hansen's estimate of where he would be under a slow bell in three or four minutes, he was traveling substantially ten miles an hour. Can we escape the conclusion that this was the speed that he was making when he testified that he thought the first collision was off the Mud Chute; because the time he had taken and the speed he made would place him there.

He also testified that he had been about a minute *on his course for Four Mile Rock,* after turning in the bay, when he stopped his engines previous to

the collision. Whether he meant exactly a minute, or substantially a minute, or even a half a minute, he must have spent *some* time on this course; and even at five miles an hour, in one minute he would travel four hundred and forty feet; therefore if he proceeded on his course northerly or northwesterly as much as a minute at five miles an hour, he had to travel from a point four hundred and forty feet south of the point of collision before he got to the place where the collision occurred and the vessel sank. If he was traveling ten miles an hour, he had to travel twice that far. Without attempting to split hairs, we cannot escape the conclusion that under his own evidence he had traveled a very considerable distance *northwesterly* to the point of collision.

We do not believe the court would be assisted by a long running commentary on the credibility of the witnesses who testified to the speed of the "Kitsap," or the speed of the "Indianapolis" at the time when they were approaching each other. They are diametrically opposed to each other and not as appellant says on page thirty-three of his brief, "all on one side." Some of appellant's witnesses claimed that the "Kitsap" was not under any considerable headway; one of them said that she was going astern, which as a matter of

fact necessarily contradicts all of the other witnesses of the appellant, because if she was going astern and the "Indianapolis" was headed for her pilot house when first seen, she would have struck forward of her pilot house when the collision occurred. In correction of the statement of appellant upon page thirty-three of his brief, we cite the evidence of Allen McDougal (R. p. 276); Penfield (R. p. 167); Walker (R. pp. 267 and 279), and Rodgers (R. p. 270). As to the accuracy and credibility of those witnesses who attempted to testify to her course and speed, we desire to draw the court's attention for the purposes of comparison to the following points. Captain Hansen said he left the dock a few minutes after 4:00. (R. p. 27.)

"Looked at the clock and it was exactly one minute past four." (R. p. 40.)

"When I backed out and came ahead I did not hear her, I thought I was safe." (R. p. 47.)

"The collision occurred around 4:39 or 4:40." (R. p. 37.)

"I looked at the clock when I came ahead on my course."

Q. "When you straightened out on your course before the collision?"

A. "Yes sir."

Q. "And it was then 4:39?"

A. "No, I left the dock at 4:35, and coming ahead it was about 4:36."

Q. "It was not when you straightened out on your course, but when you went ahead from the backing?"

A. "Yes sir."

Q. "That was the last time you looked at the clock."

A. "Yes sir." (R. p. 48.)

Q. "Did you testify before the Inspectors, 'I only looked at my watch when we backed away from Pier Four at 4:35?' "

A. "I looked at my clock. I never looked at my watch too."

Q. "Did you so testify?"

A. "I suppose I did. I don't know." (R. p. 55.)

The witness shows that his whole idea of distance and course was based upon his estimate of time that was elapsing, and because he made that turn right along every day. And he further admits that the direction of fog signals in a fog cannot be accurately determined; and that he did not know whether the signals of the "Indianapolis" indicated that she was crossing his bows or going parallel with them. (R. p. 53.) On (R. p. 56) he admits that the estimates he figured out on this occasion were testified to very largely from previous experiences. The master

and the engineer of the "Kitsap" had an interesting discussion between themselves in connection with the fact that the master ordered the "Kitsap" to proceed at faster speed, and the reliability and accuracy of the evidence of one, or either, or both of them, is well illustrated on (R. p. 65) where the engineer after disputing the statement of the master on the witness stand in a previous hearing said: "The captain and me talked it over afterwards and I came to see that he did ring the bell."

Mr. Welfare, mate on the "Kitsap," whose testimony begins on (R. p. 65) was also a very interesting witness. He seems to have been more cautious than the captain, as appears from the way in which he advised handling the ship. (R. pp. 70 and 71.) He said on (R. p. 71) that he thought that the "Kitsap" had but little headway. He testified on (R. p. 75) that he asked the captain if he had hooked her on; meaning had he rung the jingle; and on (R. p. 76) that he wanted to know if she was going full speed or going slow and what he was doing; and at the top of (R. p. 77) that he did not know how fast they were going, and that he got his ideas from the captain; and that he knew that the "Indianapolis" was due, and ought to be coming; and that he warned the captain that the "Indianapolis" was coming and

we will have to keep a lookout for her, and that the captain told him that he was keeping her over a little so that they would be sure and clear the "Indianapolis." The question arises, if they were north of the "Indianapolis" why did they need to keep her over? He knew what the captain meant and what he meant, but when it became apparent that he was becoming dangerously frank, he took instant advantage of the suggestion of counsel and said he did not know what the captain meant.

If this estimate of his own speed is thus proven to be so worthless, how much credit is to be given his estimate of our speed?

Ole Tongerose, deckhand on the "Kitsap", on (R. p. 80), judged that they left about *4:30,* because that was when the "Reliance" left, and the "Reliance" was there when they left; and he does not know when she did leave; and a little later he heard the captain say she was on her course, and then a little while afterwards he heard the "Indian." On (R. p. 80) he says he heard her about as close as he could get it about two points off the port bow; and when he saw her she was four points off the bow; and the two vessels were not meeting at right angles. He further testified that he heard the "Indianapolis"

whistle five or six times; and he heard it about five minutes before the collision. (R. pp. 86 and 87.)

If these are the things he was offered to prove and if these things are true, what of all the rest of appellant's evidence as to the time and direction of the "Kitsap's" course; and if the vessels were meeting at an angle of two points, how fast did the "Kitsap" have to move to raise the position of the "Indianapolis" from two points on the port bow to four points on the port bow?

Thomas E. Foster, whose evidence begins on (R. p. 89) was a brilliant illustration of ignorance and inaccuracy, whose evidence as to the handling of the "Kitsap" can best be commented upon by calling attention to the fact that although he had been eight or ten years to sea, yet on (R. p. 90), he says that he did not know whether the "Kitsap" was struck on the port or starboard side; and by the statement at the bottom of (R. p. 95) as illustrating his idea that she was at rest when the collision occurred, he stated that her engines had been backing four or five minutes. This was before the commissioners. On (R. p. 96) he changes the minutes to seconds. He further testified that the "Kitsap" was on her course saying: "*He must have been on his course* to be going straight

ahead." And after testifying that he knew she was going straight ahead. He first said she had no list on her and then admitted that he was not looking over the bow and said: "She might come over a little." On (R. pp. 100 and 101) he admits that he does not know what he testified to on the previous hearing.

Otho Anderson, whose evidence begins on (R. p. 101) was a fireman on the "Kitsap;" and in addition to being a general handy man, as a witness, carried the log of the engine bells in his head, as shown on (R. p. 102 and 103), before this accident took place, and before anything occurred which would naturally occur to fix it on his mind. It may be also noted that it was naturally not his business to remember the bells and yet on (R. p. 105) he undertakes to say that he could recite the bells from memory on any given trip of the boat. He explains this on (R. p. 105) by saying that he was looking for another collision.

M. D. Jackson, a witness called for the appellants, whose testimony begins on (R. p. 301) attempted to define the course of the "Kitsap" from his position on the deck of the "Reliance," saying that they completed the turn or the curve of the "Kitsap," but says that the "Kitsap" did not go south of the "Reliance;" and he further attempted to define

a previously prepared course of the "Kitsap" on appellants' Exhibit "J." Mr. Jackson is a real estate agent. Upon cross-examination he was asked if he looked at the compass and said no; and upon (R. p. 305) upon being pinned down to it, in answer to the questions, "Would you undertake to say that you could tell when she was going north after she had turned on her course there," answered, "No, I would not;" "Or west," answered "That would depend on how far I was from the harbor." He further testified that he could see the docks *for two or three minutes,* and all the time the vessel was turning. Further comment would seem to be unnecessary. Yet later on on (R. p. 306), after having identified the supposed point of collision, he admitted that he did not know how far out from the dock it was; and that he did not do anything to try to locate it; and further that he did not know how far out she steered a course on a curve. On (R. p. 307) he said that the vessels were three hundred feet apart when they began to diverge; this in a dense and heavy fog, which the appellant reiterates over and over again; and on (R. p. 308) he says that the "Kitsap" and "Reliance" were running parallel courses; and on (R. p. 309) he admits what is the foundation of all of this class of evidence, name-

ly: that he supposed she steered the same course this day that she had steered on previous occasions.

The appellant attempted to avail itself of the evidence of C. C. Kurin, whose evidence begins at (R. p. 309), and of Mr. F. L. Evans, whose evidence begins at (R. p. 312). The two witnesses contradict each other so squarely as to well illustrate the contention of the appellant that the direction of sounds in a fog is always disputed; and the sum of all of this class of evidence amounts to proving that there was a collision somewhere out in the bay, a fact which we do not dispute.

Mr. W. L. Gazzam, whose testimony with respect to the movements of the "Kitsap" appears at (R. p. 336) attempted to give the course and speed of the "Kitsap." Upon cross-examination, however, Mr. Gazzam, like every other witness who testified as to the course and direction of the "Kitsap," save only those who saw the docks and passed them on the course which is proven would take them below the Colman Dock, did not look at the compass; did not know of his own knowledge what course was being steered in the fog; and therefore proves nothing by his supposition. In fact on (R. p. 342) he testified that he rarely rides in the pilot house and knows very little about

navigation, but he did say that he saw the docks for probably *two minutes;* and if he saw the docks for *two minutes,* he had to be going parallel with their face or on a course, which was not rapidly diverging from a parallel line with these docks, because otherwise if at a rate of four or five miles an hour, Mr. Gazzam's range of vision, like all the other witnesses', would have been lost in a half a minute at the outside. He admits (R. p. 342) having seen the same Grand Trunk Dock. Mr. Gazzam testified that the two boats were making about the same speed, but he unfortunately got the "Reliance" across the bay in eighteen or nineteen minutes including one stop, or two stops, according to the evidence of appellant's witness, Shaw, (R. p. 219), the ordinary time being ten or eleven minutes. If, as appears from his evidence (R. p. 346) the ordinary time of the "Reliance" on which he was traveling to the bell buoy at Duwamish Head is ten or eleven minutes, traveling at fourteen miles an hour; taking off one minutes and not two minutes from eighteen minutes; in other words giving Mr. Gazzam the long end of his figures, the problem then is. If he covered a given course in ten or eleven minutes at fourteen miles an hour, what speed is he making if he covers that course in seventeen minutes in a dense fog. As

we figure it, the "Reliance" was traveling better than eight miles an hour as is supported by Mr. Gazzam's own evidence. *If the time he gave to* the supposed point of collision is considered, the "Reliance" was making nearly her full speed; and if the two vessels were making substantially the same speed, what must be said of the "Kitsap." The appellee respectfully submits that the foregoing resume as to the "Kitsap's" speed and course proves by facts which are not based upon mere wild guesses, but by the evidence of the witnesses who saw her from the land, and of the course she steered as determined by her position relative to the Grand Trunk Dock; of the witnesses aboard of her and aboard of the "Reliance" that she unquestionably went to some point far south of the Colman Dock; and that this evidence is not even shaken by the statements of witnesses who stood upon her deck and who one and all from Captain down never once looked at the compass; and therefore absolutely could not know what course she did steer. If she steered a course south of the Colman Dock; and especially if she steered a course which took her to a point from which she was one minute or substantially a minute in coming north to the point of collision she had to steer a course which required her to make the speed of ten to twelve miles an hour as testified by

the four witnesses who saw her pass the Colman Dock.

AS TO THE SPEED AND COURSE OF THE "INDIANAPOLIS."

The appellant in this case realized that the safest course of procedure was to avoid as far as possible any position which assumed mutual fault; as the existence of mutual fault, would very likely lead to the conclusion that if the "Kitsap" was in fault, there was little need of looking further for the sole cause of the collision. It has accordingly strenuously bent its efforts toward upsetting the evidence of the appellee with reference to the course and speed of the "Indianapolis."

Realizing the small degree of weight given to witnesses on the deck of vessels as to the speed of approaching vessels, as heretofore suggested, the appellant has gotten up a highly technical attack upon the only real evidence in the case, as to the course of the "Indianapolis," and has attempted to theoretically upset the cold hard facts and in so doing has employed one H. A. Evans, as an alleged expert navigator, who introduced his evidence with an eloquent eulogy upon his own attainments and abilities, and who proceeds in the course of his

evidence to try to get away from the deadly fact that the appellants' one witness as to the *actual location* of the "Kitsap," Captain Gibbs said he found the "Kitsap" off the Colman Dock. He assumed an imaginary curved course taken by the "Indianapolis" and "Kitsap" after the collision. He also attempted to distort the evidence of Captain Penfield; and also either unknowingly or with gross carelessness misstated the distance upon the chart and the actual distance between the bell buoy and the Colman or Grand Trunk Dock, as shown by the government's scale upon the chart itself.

First as to the evidence of Captain Penfield.

He testifies that the "Indianapolis" reached the bell buoy off Duwamish Head, the entrance to Seattle harbor, in substantially clear weather at 4:33 on the afternoon of the day of collision; that he ran the engines full speed for five minutes through what was a shifting, foggy condition in which he could see over a quarter of a mile; that the course he steered was as outlined upon the map which he produced, and which *before he testified* had already had the course laid upon it by himself, plainly and fairly drawn, from the bell buoy direct for the Grand Trunk Dock. This map is a government chart, Claimant's Exhibit 4.

Captain Penfield had had thirty years' experience at sea; twenty-one years as master; and had been on this run for four years. It would seem to be not only hypercritical, but childish to attempt the palpable subterfuge which Mr. Evans attempted, after looking at this chart. He looked at the course laid on it; he considered that this master has been steering a large steamer over this course for four years, and then tried to take advantage of a slip of the tongue made *after the chart* was *marked* and the course laid on it, and as the course appears, which error may have occurred through the inadvertence of counsel or of the witness, which appears at (R. p. 149) when the captain was describing the course which he steers by the ship's compass and which has a quarter point easterly deviation upon the course in question; and which he said was, and which is, N.E. by E.¼E. on the compass course. The inadvertent error discovered in reading the evidence afterwards being in the last question and answer upon the page in question where counsel appears to have asked the question "magnetic," to which the answer appears, "Yes sir." We think this court can readily understand how such an error could occur without any attempt to misstate the facts; and we fail to see how anyone could assume that a witness could hope to gain anything by producing a

chart with the course marked on it; and then intentionally dispute what he had marked. It might be plausibly argued if he had testified to a course and had *afterwards* produced a chart with a different course upon it; that the discrepancy was intentional. The court will see by reading the last two or three paragraphs on (R. p. 149) that the witness had marked a course upon the chart and designated it as N.E. by E. ½E. magnetic, before he answered the question, to which all of the voluminous evidence of the witness Evans is devoted.

After proceeding five minutes at full speed which carried the vessel one and one-quarter nautical miles, he put her at half speed, and during the interval of the next minute he successively slowed down and stopped her. (R. p. 143.) He had heard the whistle of the "Kitsap" when he put her under slow speed. The successive whistles of the "Kitsap" after this first one, which was slightly off the port bow, at first indicated that the vessel whistling was quite a distance away and was crossing his bow from port to starboard and apparently clearing the "Indianapolis." (R. p. 144.) And up to this time the indications were that the vessel in question, while not having the right of way, was proceeding on a course which would clear the two of any danger of collision; and

undoubtedly if the "Kitsap" had proceeded upon this course without swinging to the westward and northward, the collision would never have occurred. The next whistle of the "Kitsap" showed that she had turned and was approaching the "Indianapolis," and the engines were thereupon sent astern and within a fraction of a minute half speed astern; and the reasoning in Captain Penfield's mind clearly appears at the bottom of (R. p. 146.) He testifies that at the end of the time specified the "Indianapolis" would be practically at a stand still. (R. p. 147.) The collision occurred in the neighborhood of 4:40. This time like that of all other witnesses, under the circumstances, is an estimate, as Captain Penfield says that he did not look at the clock after 4:39.

The court will observe from the evidence that at this time the "Indianapolis" was due at the dock, if she had maintained her ordinary and regular speed across the bay.

He testified that the "Kitsap" was steering a course which had brought her south of the course of the "Indianapolis" and across the bows of the "Indianapolis" twice; and that the "Kitsap" was really the colliding force; in fact that she was coming pretty fast; and that he could see the wash upon her bow.

He gave the angle of collision as much sharper than forty-five degrees, and as approximating a head on collision. In passing we may comment upon the criticism of the appellant that we did not produce the log showing the bells which the captain gave as the "Indianapolis" approached the "Kitsap." If it will be any satisfaction to the libelant, we will admit that we did not take the time to log the bells under the imperative circumstances then commanding attention; and we imagine that if we had logged them afterwards, and had offered to use them as self-serving declarations, that the appellant would have not been slow in calling attention to our attempt to manufacture evidence; a better answer still is that an uncontradicted witness does not need corroboration. The position of the approaching vessels, and the cut in the bow of the "Kitsap," all show that the *point of impact* was something less than forty-five degrees; *and that the angle of penetration* was about forty-five degrees; and the evidence of all of the witnesses shows that the sharp steel stem of the "Indianapolis" did not enter the hull of the "Kitsap," a much lighter and wooden vessel, until it had slid along upon, *or had been scraped along* upon the hull of the "Kitsap" some two feet from bow towards stern. (R. pp. 372 and 393.) The evidence of the mechanics who re-

paired the stem and plating of the "Indianapolis" was to the effect that her stem was bent decidedly to port; and that her plating was crushed to port as would occur if the "Kitsap" had swung herself along and against the stem of the "Indianapolis." (R. pp. 270, 271 and 276.)

To this effect also was the evidence of Captain Frank Walker, a witness on behalf of the apellee, who was shown to have been a man of wide experience both as a practical sailor and navigator, and as a shipbuilder and architect. (R. pp. 269, 279, 280, 282, 290 and 291.) We desire to call the attention of the court in passing to the evidence of Captain Walker at (R. pp. 292, 293 and 294) as illustrating the contention of the appellee that if the moving force had been the "Indianapolis" and if she had had any considerable way as contended for by the appellant, a vessel of her form and size would have gone clear through the "Kitsap." Mr. Walker in his evidence also calls attention to the fact that the photographs which appellant has introduced into the record as Exhibits "E," "F," "G" and "H" are very largely pictures of damage resulting from the salvage operation; in fact Exhibit "E" shows to the court the nature of those operations and particularly the big

log which was a part of the means of handling the ship as she was raised and beached.

The evidence of the witnesses, Penfield and Jacobs, was to the effect that the "Kitsap" at the point of collision was moving quite rapidly and that she swung herself against the bow of the "Indianapolis."

Following the collision the vessels separated, but were brought together again with the bow of the "Indianapolis" held against the side of the "Kitsap" with the engines of the "Indianapolis" going ahead *dead* slow (R. pp. 165 and 170) and not simply slow as appellant states, and upon which error Mr. Evans based his imaginary curve. They remained in this position from five to ten minutes; this being, of course, only a guess in any event. That they then separated as the "Kitsap" was becoming waterlogged and sinking. The tide was at a strong ebb, flowing north. Captain Penfield testified that with the engines dead slow the "Indianapolis" would hardly move the "Kitsap" under the conditions; and that she could probably hardly stem the tide even if she were headed against it, there being, however, no evidence even of this suggestion of appellant, (R. pp. 170 and 171.) The first officer of the "Indianapolis," whose

evidence begins at (R. p. 173), testified that the fog was in streaks off the bell buoy and that you could see pretty well for some time; that he heard the whistles of the "Kitsap" on the port bow (R. p. 174), and then on the starboard bow; and that the "Kitsap" was coming fast (R. p. 175); that in his opinion the "Indianapolis" was stopped when the collision occurred (R. p. 176), that he knew from the trumpet on the Colman Dock that the "Indianapolis" was on her course; and that the "Kitsap" from the direction out of which she came in sight had undoubtedly been south of the course of the "Indianapolis." This witness had had thirty years' experience at sea; and had been three years on this course. He also tetstified upon cross-examination that he could see the wash on the bow of the "Kitsap" as she was coming ahead.

B. F. Jacobs, a witness for the appellee, was called to testify as to the whistles and as to the speed of the "Kitsap" when she loomed out of the fog. He was not called to log the course of the "Indianapolis" and expressly stated that he was paying more attention to the whistles than he was to the speed of the boats, until they got in a close proximity to the docks (R. p. 208, 210 and 212.) He testified that the "Kitsap" was making considerable speed when she appeared.

(R. p. 209.) He heard the whistles of the "Kitsap" first on the port bow and then on the starboard bow. Upon cross-examination, counsel attempted to coax him into making numerous guesses as to time and course of the "Indianapolis," and against the demur of the witness, succeeded in getting him to guess at a number of matters which he expressly disclaimed an accurate knowledge of; and now in his brief appellant attempts to discount the evidence of a credible witness because in some respects his guesses did not coincide with Captain Penfild's positive statements as to course and speed. Counsel has not succeeded in any way breaking down his evidence as to the material questions upon which he was called to testify. Captain Percival, a witness for the appellee, whose evidence begins on (R. p. 245), and who had been mate, pilot and master on the Sound for nine years, testified that as the "Kitsap" appeared out of the fog, she was swinging on her port helm hard a starboard; he had heard the whistles of the approaching "Kitsap" and had determined that the vessel was rapidly approaching on the starboard bow of the "Indianapolis." (R. pp. 246 and 247.) He states further on (R. p. 251) that the "Indianapolis" had, if anything, very little headway; and that the "Kitsap" was the moving vessel; and that the "Indianapolis" was un-

der control. This witness does not pretend to know the exact location of the "Indianapolis" when he came on deck, because he did not see the land on either side. We particularly call the court's attention to the candor and fairness of this witness as shown on (R. p. 255) and to the care with which he avoided making any absolute statement as to the "Indianapolis" having a possible slight headway; and further to the description he gave of the actual approach and meeting of the vessels, which is in accordance with the evidence of all the witnesses as to the action of the stem of the "Indianapolis" in not cutting into the hull of the "Kitsap" at once and directly as would have been the case if she had been the principal moving object and the "Kitsap" stationary. We desire to call particular attention to the statement of this witness at (R. p. 256) where he was asked: "You would not tell how the "Kitsap's" *engines* were working? answered, "No, sir, I am of the opinion, from her movements, that she was backing." This was cross-examination. Upon (R. p. 260) counsel for appellee appreciating the adroit way in which the questions had been put to the witness on (R. p. 256), in order to clear any doubt upon the matter, asked him whether or not he had referred to the engines of "Kitsap" as backing or to the boat as backing; and

to which the witness answered that he thought the *engines* were backing at the time we hit; and at the top of page 211, expressly and clearly repudiates any imputations as to the *"Kitsap"* herself backing by saying expressly that she was not. We call the court's particular attention to this because counsel for appellant was not careful in reading the evidence and in his brief inadvertently misstates the fact in this respect. Upon (R. p. 260) this witness further testified that he had not seen the bell buoy and had not paid particular attention to the exact location of the "Indianapolis" when he went on deck. As in case of the witness Jacobs, not having been called to locate the course of the "Indianapolis," upon cross-examination, counsel also attempted to snarl him up in his evidence and then to discredit him in his argument.

The appellant attempts to attack the evidence of the master of the "Indianapolis" in two ways. First by witnesses as to fog, and second by the theoretical witness Evans. He introduced the evidence of Captain A. J. Wood, the master of the West Seattle Ferry to show that the log of the ferry boat indicated that there was a dense fog in Seattle Harbor on the evening in question. Without raising the question of the competence of such evidence. We are not disput-

ing this was very largely true on the Seattle shore. The cross-examination of this witness at the top of (R. p. 315) exactly supports the contention of the appelle that it was a shifting fog, thin in one place and thick in another; and that it is thicker where the ferry crosses, a half a mile south of the Duwamish Head, than it is at the course of the "Indianapolis" steers.

He also introduced the evidence of W. C. Gilbert, who testified that he noticed no difference in the vibration of the engines of the "Indianapolis" from the time she left Tacoma harbor until he was knocked out of his chair by the collision. We note the *exact time when* he was knocked out of his chair, the inference then being that the engines ran full speed ahead until the actual collision. Will counsel for the appellant say for one moment that he believes this evidence; would he suggest to this court that a vessel like the "Indianapolis" going full speed ahead into the "Kitsap," would only have cut seven or eight feet into her light wooden hull; does he want the court to think his other witnesses testified to any such state of facts. The statement is so preposterous that no one would believe it, and yet if this witness did not know of the vibration stopping, until he was knocked out of his chair; and if, as a matter of

fact, the vibrations did stop at one time before that; and he did not notice them, what does his evidence amount to. If they stopped once and he did not notice them, they might have stopped a dozen times. He further testifies on (R. p. 115) that the fog only lifted for about four or five minutes all the way over from Tacoma to Seattle; and that it was so dense that "you could not see your hand in front of you, hardly." Does the libelant desire to contradict one of its principal witnesses, Mr. Gazzam, who at (R. p. 338) testified as follows (he being on the "Reliance" which they say left approximately at the same time with the "Kitsap"): "From 4:30 until we reached the buoy, at the time we passed the buoy it lightened a little and by the time we reached Alki Point it was *very* clear." It seems to us that Mr. Gilbert's evidence is disposed of.

The appellant produced the witness F. F. Wells, structural engineer, who traveled over from Tacoma on the "Indianapolis" and who was asked if he noticed any difference in the amount of vibration from the time she left Tacoma until the collision; and who said that he did not notice any such vibration. What we have said with reference to the witness Gilbert applies with equal force to this witness, because we do not think that counsel for the appellant

will seriously argue that the "Indianapolis" struck the "Kitsap" with her engines going full speed ahead.

We come now to the main reliance of the appellant, to-wit: Witness Evans, whose whole energy is taken up in disproving the actual observable facts by a process of induction not based upon experience, nor founded upon the actual facts in the case.

As we have heretofore pointed out, Mr. Evans attacked the chart upon which the course of the "Indianapolis" had been plotted by the captain, and because of the inadvertent use of the word magnetic on the bottom of page 149 in connection with the difference between the deviated compass course of the "Indianapolis" and the magnetic course on the chart, assumed that he could run the course of the "Indianapolis" a quarter of a point further to the northward and could thereby get the "Indianapolis" in a position where the "Kitsap" would not have crossed her course. He also, it seems to the appellee, purposely attempted to construe certain marks placed upon the chart by Captain Penfield as illustrative of places where he changed the speed of the "Indianapolis" into exact, though imaginary locations in the water. He also for some reason overlooked the fact that the chart with the extension of the

docks thereon of eight hundred feet, shows that the distance from the bell buoy to the end of the present docks is not two nautical miles. Of course, Mr. Evans may not have put the dividers upon the chart, although a man of his supposed scientific attainments should not allow counsel for one of the parties to correct him along the lines of his own business. He should, however, have done so especially when the suggestion was made by Captain Penfield at (R. p. 150) that the docks had been carried out eight hundred feet. The whole purpose of Mr. Evans in attempting to construe this evidence was to contradict Captain Penfield and is based upon a very simple problem of arithmetic, namely: Take two nautical miles, the original course from bell buoy to the shore on the Seattle side; deduct eight hundred feet for the fills and docks on the Seattle side; deduct one-fourth nautical mile for the supposed point of collision off the dock; deduct one and one-quarter nautical miles for the uncontradicted run of the "Indianapolis." We have then much less than a nautical half mile within which Mr. Evans makes all his fine deductions; and if the "Indianapolis" at the beginning of this fractional distance was running at full speed and gradually diminished until just before the collision, her average speed in the

middle of this course would not be nine and one-half miles as testified to by Mr. Evans, but would be less than that; *and her speed at the end of the course* and not her average speed at the middle of the course is the speed in question in this case, so that all of his fine house of cards falls to the ground because of lack of exactness in the premises from which he started.

We say all of this because we believe that the witness did not think that the marks in question were intended to be measured marks, but were simply illustrative of the supposed position. These were no more intended to be accurate and exact than the diagram drawn upon the chart (appellee's Exhibit Nine) illustrative of the supposed position of the "Kitsap" and her course, was intended to be exact. We make no pretense of knowing exactly how far south the "Kitsap" went or of her exact degree of curvature. It is not necessary for us to establish it with exactness. Of course, the further south she went the faster she had to go; and if she went south of the Colman Dock at all, she had to go much faster than five or six miles an hour. And this is the sum and substance of Mr. Evan's evidence with relation to the course of the "Indianapolis." We next come to his very interest-

ing calculations to prove that the Kitsap was not found where she was found, or to put it in his language to prove that while she was found as appellant's witness Captain Gibbs said "off the Colman Dock," after having traveled as her master said about a minute on a northwesterly course and with a favorable tide, this was not where the collision took place. Mr. Evans then proceeds to change the facts in the following particulars: He raises the speed of the "Indianapolis" while she had her stem against the side of the "Kitsap" from dead slow, i. e. her engines, to ordinary slow; he raises the time from ten minutes as testified to by Captain Penfield to twenty minutes; he makes no comment upon the waterlogged condition of the "Kitsap"; he makes no allowance for the time during which the vessels were separated; but in order to get the collision north of the course of the "Indianapolis," he proceeds to draw an imaginary but supposed course of curvature; and the appellant seriously asks this court to consider it, and to consider it for the purposes of disputing the known tangible evidence of where she was found and the fact that four unimpeached and supposedly fair witnesses actually saw her going south of the Colman Dock, and in face of the conclusion from the witnesses of appellant who testified

that she did not go south of the Colman Dock *because she had not done so heretofore,* but who saw no compass or land mark and in spite of the two witnesses who testified to seeing the Grand Trunk Dock, and the fire boat slip within one hundred or two hundred feet after she had passed south six hundred feet and had only gotten one or two hundred feet away from the face of the Grand Trunk Dock.

Furthermore the whole attempt to disqualify the evidence of Captain Penfield, which the appellant had no means of contradicting directly, is based upon an assumption which there is no evidence to support. The point of collision for all we know may not have been exactly a quarter of a knot off the dock, but a few hundred feet either way would make all the difference in the world in the speed of the "Indianapolis," when this difference is to be deducted out of a small fraction of a half knot of the slow end of the course. We submit that it should be borne in mind that it is not incumbent upon the appellee to prove these exact locations in the water and in the fog, and if the appellant is without the means of accurately contradicting the evidence of the appellee, that is no fault of ours, and it certainly furnishes no basis for hypothetical dis-

putes and more especially for any distortion of the actual facts, which he does seek to produce. Undoubtedly Captain Penfield's evidence of where he was after he left Duwamish Head was based upon the time and the speed which the "Indianapolis" made and no amount of argument can distort these into a statement that he plumbed his location in the water by anything else than his course and his speed.

The witness Evans was also given an opportunity to illustrate his very expert knowledge in explaining how the sharp iron stem of the "Indianapolis" failed to penetrate the hull of a light wooden vessel like the "Kitsap" when the "Indianapolis" was rushing upon her at high speed, until after the stem had slipped along the hull of the "Kitsap" two feet. This explanation is on a par with the rest of his evidence and simply shows that he is such a blind partisan as to attempt to justify any desired assumption without rhyme or reason. This fact is not open to dispute, nor is the fact that the stem of the "Indianapolis" and the plating on her port side were bent to port, although she was a strong iron ship. Counsel on page 33 of his brief seems to have forgotten that four witnesses testified positively to the fact which he there supposes

that we produced no witnesses to sustain. No better illustration of the futility of appellant's argument could possibly be hoped for than the case he cites of *Brooks against D. W. Lennox,* 4 Fed., Case Number 1952.

Coming now to the statement on page thirty-eight of appellant's brief, that Captain Penfield testified that the deviation in the compass of the "Indianapolis" was one-quarter point easterly; and that he steers his course by the compass N.E. by E. ¼ E. to make the course N.E. by E. ½ E. magnetic. It is a matter of common knowledge that all compasses have a deviation, and Mr. Evans the expert made no attempt to deny it. But counsel asks on page thirty-eight and thirty-nine of his brief why Captain Penfield had not swung his compass in determining this course.

The futility of this question should occur to anyone in case of the master of a ship who for four years has steered this course several times a day. The very doing of this was the accomplishment of the same purpose which would be involvin swinging the compass every time he steered the course. It is true that he testified that he ran by his compass in clear weather, but he *did not say*

that he steered his ship N.E. by E. ½ E. Compass in clear weather; in fact would the court expect a witness of any intelligence at all who was capable of being a master of the "Indianapolis" to steer across the bay in clear weather with his eyes on the compass and without looking ahead; and in order to meet counsel's argument steer a course which would take him away south of his destination and then finding that it landed him south of his desired landing, to go on repeating it. To make such a suggestion is to answer it. We must assume a reasonable degree of ordinary common intelligence in any ship master who can look straight ahead. If this were a new course or the first time he tried it, it might possibly argue that he would steer directly out of the course which would take him to the destination he wanted, but we hardly believe counsel will seriously expect the court to believe that he would do it habitually or that the evidence in the case could be construed into any such fantastical proposition. We desire to call attention to the inconsistency of the appellant's position in its brief with reference to the distinction of sounds in a fog. Counsel takes both sides of the question. If it suits his purpose the witness is held to strict accountibility with reference to the sounds in a fog. If it

comes to a question of two of his witnesses contradicting each other as to the sounds heard off the docks, one saying southwest and the other northwest, he explains them naturally by saying that sounds are deceptive in a fog. We think that human experience justifies the latter statement and we contend that as in the case of the witness Jacobs when counsel proposes to hold him to accountability as to a fine degree of distinction between one point and two points, that he carries criticism to a point beyond reason. (R. p. 49).

RULE SIXTEEN

Counsel for appellant in this case in his endeavor to fix the whole responsibility for the collision upon the "Indianapolis" has overlooked one of the Rules governing steamships in a fog, and its plain application to the facts in this case, and has failed to cite to the court the case of the "Beaver" "Selja" recently decided by the United States District Court for the Northern District of California, which, while, of course, not controlling upon this court, is a valuable contribution to the list of decisions establishing the principles which should be applied. Its application is apparent from the reading of the rule, which is found in Volume Two,

Federal Statutes Annotated, page 178, and which became a part of the law in its present form under the act of June 7th, 1897, Thirty Statutes at Large, 96 to 99.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and navigate with caution until the danger of collision is over."

With reference to its application to the "Kitsap," the master of the "Kitsap" testified in answer to the question: "What, if anything, did you do with the "Kitsap" after you heard the "Indianapolis'" fog whistles?" "After we heard about three whistles we stopped," (R. p. 30) the mate of the Kitsap testified.

Q. "When did you first hear the "Indianapolis" whistle?"

A. "I first heard her whistle after I came forword and asked the captain if we were on the course yet."

Q. "Where did you hear these whistles, what direction?"

A. "I heard them on the port bow."

Q. "How did they sound, were they close to you?"

A. "Well, the first one or two was pretty well off, but they were getting closer right along."

Q. "About how many points off your port bow?"

A. "Two points."

And later as follows:

Q. "What was done after you heard the 'Indianapolis' whistles?"

A. "I said to Captain Hanson, did you hear the 'Indianapolis' blowing?"

Q. "Did he say anything?"

A. "He says yes, I hear her, something like that."

Q. "Go ahead and state what is the next thing that occurred there?"

A. "Well then, I heard another whistle. I says, she is getting closer, you better stop her, captain."

Q. "What did he do, if anything?"

A. "He stopped her." (R. p. 70).

From the evidence, it appears certain that the suggestion of the court in the "Beaver"-"Selja" case was the practical suggestion in the mind of the mate, and that it should have been acted upon, even if there had been no previous negligence on the part of the "Kitsap."

Appellant will doubtless come back with the very natural argument that the same principle applied to the "Indianapolis." The difference between the two is this, that the Master of the "Indianapolis",

although he did not stop his engines when he first heard the whistle of the "Kitsap" according to his evidence was not at that time within the meaning of the rule as illustrated in the opinion of Judge Bean in the "Beaver"-"Selja" case, or within any fair interpretation of the rule.

In other words the language of the rule "the fog signal of the vessel, *the position of which is not ascertained"* does not apply if the Master of the "Indianapolis" at that time not only ascertained her position, but ascertained it correctly and ascertained that it was proceeding at a distance and on a course, which if maintained, would have passed her far south of the "Indianapolis" when the "Indianapolis" reached the crossing point. (R. p. 156). It was only when he heard the whistle of the"Kitsap" on his starboard bow and ascertained that she had altered her course and was coming toward the "Indianapolis" that the application of the rule in question applied to the "Indianapolis"; and at that time she complied with the rule.

The appellee has no fault to find with the opinions of the various court's citations, which are found upon pages 57, 58, 59 and 60 of the appellant's brief, as they are undoubtedly well established principles

of law and more particularly as they are of a general nature and apply to the contentions of the appellee as well as to the appellant.

We think the decision of this case rests almost entirely upon the one or two questions of fact involved in the disputed evidence; and that the arguments of appellant as for instance at the bottom of page 109 and the top of page 110 of his brief amount simply to begging the question.

Most certainly if the court finds as a fact that the "Indianapolis" was "grossly at fault" the citation of authority by us would certainly fail to relieve us of the penalty for our conduct. But it would not relieve the appellant of his fault and his share in the penalty. The statement following, however, that we will not seriously contend to the contrary is equivalent to saying that we will not defend the case. We might just as seriously assert our position which is, that the Kitsap was grossly at fault, and say that we do not think the appellant will contend to the contrary.

We do, however, desire to call the court's attention to the fact that what is known as the crossing rule, and upon the basis of which the appellant contends that we violated the Rules of the Road, will not apply in a fog.

The Grenadier vs. August Korff, 74 Fed. 974.

In that Mr. Justice Butler uses the following language:

"What occurred before the signals were heard respecting the speed and navigation of the respective vessels is not deemed important. At this time each was enveloped in fog, so dense that the other could not be seen, nor her location or course be ascertained from the signals heard. They might be near together or far apart; their courses might be crossing, or opposite, or otherwise. Nothing could be determined by sight, and sound was unreliable—likely to be obstructed or deflected, and calculated to mislead.
* * * *

"The sixteenth clearly contemplates navigation under ordinary circumstances, where the vessels can see each other and thus ascertain their respective courses. Its application is impossible where the vessels are enveloped in dense fog, unable to see each other or to ascertain their respective locations and bearings."

The reference here is, of course, to the rules as numbered at that time.

Indeed, there would seem to be no escape from this as a common sense, and therefore necessary conclusion.

If, however, counsel desires to seriously stand upon this position, it seems as if the appellee is entitled to insist that the "Kitsap" only acquired the advantage of the crossing rule, as against the "Indianapolis" by violating that rule herself and un-

doubtedly the officers of the "Indianapolis" who heard her whistles on her port bow had a right to assume that although she was violating the rules of the road as to any steamers bound to the Seattle docks, still she was apparently far enough away and proceeding upon a course which if she maintained, it would avoid a collision.

What we have said with reference to the general nature of citations applies also to the cases cited upon pages 111 and 112 of appellant's brief. If the "Indianapolis" should have been under command, shall not the same be said of the "Kitsap"? Does not the citation for instance of the City of New York, 147 United States, 72, apply just as much to the "Kitsap" in running down the water front already in a fog, as it does to the "Indianapolis" proceeding toward the waterfront as first in clear weather and afterwards in thickening weather, and as appellee contends, slowing her speed as she approached the denser condition.

To answer the argument on pages 113 and 115 of appellant's brief, which is simply a reiteration of the argument previously made by him, would of course involve a reiteration by us with reference thereto. The statement of all of this matter illus-

trates the fact that the appellant is so far committed to his side of this case as to make it impossible that he should fairly consider the contention of the appellee; and the appellee is content in so far as the merit of the case is concerned to rest the decision thereof upon the facts which present themselves from physical evidence and which do not depend upon the contradictory opinions of witnesses upon the deck of other ships.

Nothing which the appellant has said has tended to move the "Kitsap" one foot from the spot where she was found. Nothing has tended to dispute the evidence of the witnesses who saw her pass south of the Colman Dock; nothing has tended to dispute the forced admission of her master that he proceeded approximately one minute on his course in a northwesterly direction to the point of collision from a point somewhere south thereof; nothing of a tangible character has tended to show that any witness who saw the "Kitsap" and observed her movements knew what course she did steer from any of the observations or physical evidences upon which an accurate human judgment could be based. The fact that she steered one course in open weather on one day does not in our opinion tend to prove with the slightest weight what course she steered some other

day in a fog from a different point, and from a different angle of departure at an unknown degree of helm; at a speed which was confessedly raised by the engineer in obedience to a disputed order from the wheel house.

And this is the sum and substance of the evidence of all on board the Kitsap.

DAMAGES.

It is under this head that the appellee feels most strongly inclined to resist the contention of the appellant. We subscribe fully to the statement "That restitution for the loss sustained and no more is the rule for determining the amount of damages in case of partial loss." The position which the appellant takes in this case, however, is not the restitution for loss sustained and no more. It is stipulated in this record that the net earnings of the Kitsap were $50.00 per day. It is a part of the record in this case that the appellant was the owner of a spare boat.

We cheerfully concede the law as stated by this court in the State of California, 54 Federal, 404, with reference to the employment of a spare boat; and here also the appellant is met by the facts.

He stipulates this loss was the loss of what the Kitsap earned, fifty dollars per day; he attempts to say that the charter value of his spare boat is twice that sum, without, however, establishing that there is any market charter value for such a boat or any boat in the port of Seattle; he overlooks the following language at page 407 in the case cited, to-wit: "And it is our opinion that the value of the use of the injured vessel during the time of actual necessary detention is the proper measure of the amount to be allowed." The evidence in this case showed that there was no market charter value of the spare boat "Hyak". She had been under charter to the appellee a year previous, but she had no charter at the time in question; she had none offered or available during any of the time in question.

In this connection the Supreme Court of the United States in in the case of *The Conqueror,* 166 United States, Page 110; 41 L. ed., at page 944, uses the following language:

"That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably sup-

posed to have been, lost, and the amount of such profits is proved with reasonable certainty. In one of the earliest English cases upon this subject (The Clarence, 3 W. Rob. Adm. 283), it was said by Dr. Lushington that 'in order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount'. * * *"

And at page 945 further says:

"The difficulty is in determining when the vessel has lost profits and the amount thereof. The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.

In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention. The Mayflower, Brown, Adm. 376; The Transit, 4 Ben. 138; the Emilie, 4 Ben. 235."

The only fair basis of loss to the appellant in this case is the loss which we caused him to suffer, if we are the party in fault. He was making fifty dollars per day with the Kitsap. During one hundred and thirty-nine days he was deprived of this

profit. (We say he was deprived of it, when as a matter of fact he was not deprived of anything because he used a boat which was idle and which was without charter, and thereby avoided the loss). The court, however, says, and we think justly, that if he furnishes another vessel, which does the work that we shall not be allowed to take advantage of his forehandedness in this particular.

But what does the appellant desire to do? He desires to make us pay him a profit of One Hundred per cent. out of this accident. He says you have lost my boat; I was making Fifty Dollars a day with her; I have a boat which will take her place and which will earn me Fifty Dollars a day, and I will ask you to pay me twice as much money as I would have made if this accident had not occurred.

The insistence by the appellant upon this unconscionable and, we think, outrageous demand has prompted the appellee to stand strictly upon our technical legal rights with reference to another item of damage claimed by the appellant. It is nowhere shown in this record that the appellant, or any person, or corporation a party to this record, or even named, or known has been put to any loss or damage in the matter of salving the "Kitsap" and we dispute

the right of the appellant to recover for the salvage item upon the ground that there is no proof of interest in the appellant or in anyone for raising and salving her.

We have no desire to split hairs for the principle of subrogation as between owner and underwriter, but we respectfully maintain that those principles are not invoked by the facts or the record in this case. The fact that S. B. Gibbs, represented some underwriters, (who they are; what their insurance was; whether they were actual underwriters and for how much, being entirely absent from the record) we maintain cuts no figure, nor do we agree that if a volunteer sees fit to raise a sunken ship and return her to the owner and does it gratuitously that thereby the owner *ipse facto* can recover from one who was responsible for sinking her. If he shows that the salvor does it and claim salvage, undoubtedly a different case is made.

The trouble with appellant's contention is that he desires the court to supply by inference, evidence which is missing, and we most respectfully submit that in want of any evidence in support of actual damage to the owner or of subrogation, that the recovery allowed by the court below for the salvage item was erroneous.

In conclusion we submit that the evidence in this case overwhelmingly shows that the "Kitsap" was fully and clearly responsible for all of the loss and damage which occurred and that the appellee is entitled to recover its full damage and loss from the appellant as prayed for in the court below and as respectfully submitted to this court; and that in any event the appellee is entitled to be relieved upon the case made from any contribution to the so-called salvage expense.

Respectfully submitted,

IRA BRONSON,
Attorney for Appellee.

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